United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 381-48

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, and KENNETH R. MILLER, *Plaintiffs,*

v.

J. HOWARD MCGRATH, Attorney General's Office, Department of Justice, Washington, D. C., *Defendant.*

STATEMENT AS TO JURISDICTION.

The Solicitor General, on behalf of the defendant-appellant, J. Howard McGrath, or, in the alternative, his successor in office, James P. McGranery, or, in the further alternative, the United States,[1] and in compliance with Rule 12 of

[1] The appeal is being taken in this form in order to safeguard the interest of the Government in obtaining review and reversal of the judgment of the district court holding unconstitutional the Federal Regulation of Lobbying Act. Defendant McGrath resigned as Attorney General of the United States on April 7, 1952, prior to the entry of the district court's judgment against him on May 2, and was succeeded in office by James P. McGranery on May 27, 1952. In

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the Rules of the Supreme Court of the United States, as amended, submits herewith a statement

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our view, Mr. McGrath has standing to take this appeal and to urge reversal of the judgment or its vacation on the ground of mootness (as he urged in the district court). However, if Mr. McGrath's resignation is regarded as precluding him from taking this appeal (cf. *Davis* v. *Preston*, 280 U.S. 406), it is respectfully requested and moved that the appeal be deemed taken on behalf of Mr. McGranery, the present Attorney General, and that the latter be substituted as appellant in place of Mr. McGrath. Such substitution, if necessary, is requested solely in order to preserve the Government's right of appeal. The request in no way concedes or implies that Mr. McGranery has threatened or is threatening to institute criminal prosecutions against either or both appellees for violations of the Act, or that the allegations or findings in the district court relating to Mr. McGrath or Mr. Clark are applicable to Mr. McGranery.

The Solicitor General also requests and moves, in the further event that neither Mr. McGrath nor Mr. McGranery is deemed a proper party appellant, that this appeal be considered as taken on behalf of the United States, which, under 28 U.S.C. 2403, has the right to intervene in "any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question * * *." As intervenor, the United States has all the rights of a party, including the right to appeal. Such intervention of the United States in this case as appellant would be solely to vindicate its concern that a decision of a district court invalidating an Act of Congress affecting the public interest, which would otherwise be non-reviewable for lack of a proper party appellant, should not stand unreviewed or, if that is the proper procedure, be vacated on the ground of mootness. Where Congress has given the right of appeal, the losing side is entitled to an appellate decision, if only an order vacating the judgment as moot. Cf. *United States* v. *Munsingwear*, 340 U.S. 36, 39-41.

showing the basis of the jurisdiction of the Supreme Court to review on appeal the final judgment entered by the district court in this case.

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia, dated March 17, 1952, is reported at 103 F. Supp. 510. Copies of that opinion and of the final judgment entered on May 2, 1952, are attached hereto as Appendix A.

JURISDICTION

The judgment of the district court was entered on May 2, 1952. Petition for appeal was presented to that court on May 28, 1952.[2] The suit was brought to enjoin enforcement of the Federal Regulation of Lobbying Act as unconstitutional, and was tried before a statutory three-judge district court specially convened pursuant to 28 U.S.C. 2282. The jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by 28 U.S.C. 1252 and 1253.

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[2] The judgment was entered on May 2, 1952 to take effect *nunc pro tunc* as of March 17, 1952. Under 28 U.S.C. 2101(a), the appeal must be taken within 30 days after "the entry" of the judgment. The thirty-day period in this case began to run as of the date of actual entry of the judgment, and not as of the date to which the judgment was attempted to be made retroactive. *Seymour* v. *Freer*, 5 Wall. 822; *United States* v. *Gomez*, 1 Wall. 690, 699-700; see Rule 58, Fed. Rules of Civil Procedure.

STATUTE INVOLVED AND QUESTION PRESENTED

The full text of the Federal Regulation of Lobbying Act (60 Stat. 812, 839; 2 U.S.C. 261 *et seq.*), which was enacted as Title III of the Legislative Reorganization Act of 1946 (60 Stat. 812), and the full text of that Act's separability clause, are attached hereto as Appendix B. The Lobbying Act neither prohibits lobbying nor limits the amount of money that may be expended in lobbying, but simply requires that certain records be kept and that quarterly financial statements be filed. These disclosure requirements are, in general, made applicable by Section 307 of the Act to any person collecting or receiving money "to be used principally to aid, or the principal purpose of which person is to aid, in . . . influenc[ing], directly or indirectly, the passage or defeat of any [federal] legislation . . .". Section 310(a) makes violation of any of the disclosure requirements a misdemeanor, punishable by fine or imprisonment, and Section 310(b) prohibits, for a period of three years, any person convicted of such a misdemeanor "from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation."

The principal questions presented are:

1. Whether the provisions of Section 307 are so vague and indefinite as to violate the due process clause of the Fifth Amendment.

2. Whether Section 310(b)'s prohibition violates the rights of freedom of speech and of petition under the First Amendment.

3. If the preceding question be answered in the affirmative, whether the unconstitutionality of that prohibition invalidates the entire Act despite the applicability of the separability clause to the Act.

4. Whether the district court erred in reaching and deciding the constitutional issues without first deciding the non-constitutional question, *i.e.*, whether the Lobbying Act applies to the appellees.

5. Whether this proceeding was moot or abated at the time of entry of the district court's judgment and is now moot or abated, and whether the judgment should be vacated or reversed as moot or abated.[3]

STATEMENT

This action was instituted by the National Association of Manufacturers of the United States (N.A.M.) and Kenneth R. Miller, its Treasurer and Business Manager, "against the Attorney General of the United States to enjoin him from instituting prosecutions against them for violations of the Federal Regulation of Lobbying Act" (Opinion, Appendix A).

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[3] In addition to these questions, all of the additional points raised in the Assignment of Errors filed herewith are also presented by this case.

The complaint, filed January 28, 1948, named as defendant "Tom C. Clark, Attorney General's Office, Department of Justice, Washington, D. C." It sought to enjoin enforcement of the Act on the grounds that it is inapplicable to the appellees, N.A.M. and Miller, and that, even if applicable, it is unconstitutional. A three-judge district court was convened to hear the case as required by 28 U.S.C. 2282.

On March 7, 1949, the district court denied Mr. Clark's motion to dismiss based on the grounds that there was no justiciable controversy and that there was an adequate remedy at law and hence no equitable jurisdiction. Mr. Clark then answered and on June 6, 1949, moved for summary judgment on the grounds that he had not threatened to enforce the Act against the appellees and that the Act is constitutional.

Before this motion was decided, and on August 24, 1949, J. Howard McGrath succeeded Mr. Clark as Attorney General. A motion to dismiss the action on the ground that it had abated upon his resignation was filed by Mr. Clark but denied by the court on February 7, 1950. Appellees then moved to substitute Mr. McGrath for Mr. Clark and for leave to file a supplemental complaint.

In March, 1950, appellees' motion was granted, and defendant McGrath answered the supplemental complaint, denying that he had threatened appellees with enforcement of the Act and deny-

ing that the Act was unconstitutional. At the same time, Mr. Clark's motion of June 6, 1949 for summary judgment was denied, the court ruling that there were genuine issues of fact as to both the threatened enforcement and applicability of the Act to appellees. Depositions were taken on both issues. A Stipulation of Facts, agreed to be representative of plaintiff's activities, was also filed with the court.

Two years later, on March 17, 1952, the district court handed down its opinion, refusing to pass on the applicability of the Act to appellees on the ground that the defense of inapplicability could be asserted "in a criminal prosecution, if a prosecution is instituted." Notwithstanding its refusal to hold that the Act applies to appellees, the court went on to consider and adjudicate the general constitutional contentions posed by appellees. It held that the language of Section 307, making the disclosure requirements applicable to any person "whose principal purpose" was "to influence, directly or indirectly, the passage or defeat of any legislation" is so vague and indefinite as to be in violation of the Fifth Amendment; that the prohibition in Section 310(b) is repugnant to the constitutional guaranty of freedom of speech and of petition; that Sections 303 through 307 of the Act are unconstitutional for the additional reason that the penalty attached to their violation by Section 310(b) contravenes the First Amend-

ment.[4] The opinion further stated that the appellees had, "in fact, been threatened" informally with criminal prosecution, and granted a permanent injunction against prosecution of appellees "for violations of any provision of Section 303 to 307, inclusive".

Before an order granting this injunctive relief was entered, defendant McGrath, on April 7, 1952, resigned from office. Refusing to hold that the action abated because of his resignation, the district court entered its judgment on May 2, 1952, to take effect as of March 17, 1952, permanently enjoining "the defendant from instituting any prosecution against" appellees.[5]

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[4] Although the holding of unconstitutionality is expressly declared to be limited to Section 303 through 307 and to Section 310(b) of the Act, it should be noted that Section 308, dealing with lobbyists who engage themselves for pay, contains language similar to that found fatally defective by the court below in Section 307. Moreover, the penalty provision, contained in Section 310(b), ruled by the court to be in violation of the First Amendment, also attaches to violations of Section 308, and, if the court's reasoning is sound, would equally invalidate Section 308. Therefore, the net effect of the holding of the district court, if allowed to stand, is to invalidate the entire Lobbying Act.

[5] The defendant had filed a memorandum with the district court suggesting that (1) the action had abated on the resignation of Mr. McGrath and should be dismissed as moot, and (2) the court should not enter an order of injunction against Mr. McGrath *nunc pro tunc*.

THE QUESTIONS ARE SUBSTANTIAL

The Lobbying Act advances an interest of vital importance to the proper functioning of representative government. Through its disclosure requirements as to "membership, source of contributions and expenditures of organized groups", the Act was designed to aid "Congress in evaluating their representations and weighing their worth" (S. Rep. No. 1400, 79th Cong., 2nd Sess., p. 5). The district court's decision, by invalidating the Act, denies to Congress this means of determining whether pressure groups have distorted and obscured public opinion in order to serve their special interests. The question whether the court erred in reaching the broad constitutional issues posed by Appellees and in holding the Act unconstitutional is thus one of obviously substantial importance. The importance of the decision below is underscored by the fact that the court's holding misinterprets constitutional requirements and, at the same time, ignores settled principles of constitutional adjudication.

1. In a number of recent cases, the Supreme Court has been called upon to decide whether a criminal statute was definite enough to satisfy the requirements of the due process clause. The test is whether a statute is sufficiently definite to give notice of the required conduct to one who would avoid its penalties. *Jordan* v. *De George*, 341 U.S. 223, 231-232; *Dennis* v. *United States*, 341 U.S. 494, 515 (opinion of Vinson, C. J.); *United States*

v. *Hood*, 343 U.S. 148, 151; *United States* v. *Spector*, decided April 7, 1952. But "no more than a reasonable degree of certainty can be demanded", since "few words possess the precision of mathematical symbols." Accordingly "most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions." *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340. The statute meets the constitutional test of "reasonable degree of certainty" even though "one who deliberately goes perilously close to an area of proscribed conduct [is required to] take the risk that he may cross the line." *id.* The boundaries of criminal statutes are rarely, if ever, marked with precise accuracy; and the presence of any difficult "border line" or "peripheral" cases does not invalidate a statute where there is a hard core of circumstances to which the statute applies and as to which the ordinary person would have no doubt as to its application. *Jordan* v. *De George, supra; United States* v. *Wurzbach*, 280 U.S. 396, 399; *Nash* v. *United States*, 229 U.S. 373.

Application of these criteria of definiteness to the statute here involved shows that it satisfies the constitutional requirements. The Act gives clear warning that it applies to any person who receives contributions or expends money for the purpose

of "influenc[ing], directly or indirectly, the passage or defeat of any [federal] legislation." We believe that the quoted clause, found too indefinite by the court below, gives clear warning to potential violators. In any event, appellees could not be heard to protest that, were it applied to them, the Act failed to put them on notice of its prohibitions. As shown by the Stipulation of Facts, N.A.M. utilizes every known lobbying and propaganda technique for the purpose of influencing federal legislation of interest to its members. Moreover, the constitutional requirement of definiteness is met by the language of the Act on its face: all that must be done to avoid the area of danger, even if there existed any doubt as to the Act's applicability, is to keep a few records and file a quarterly financial statement. In addition, the fact that the Act requires a *purpose* or *intent* to influence legislation, furnishes further rebuttal of the argument that the Act is too vague. *Boyce Motor Lines* v. *United States,* 342 U.S. 337, 342; *Dennis* v. *United States,* 341 U.S. 494, 515-516 (opinion of Vinson, C. J.); *Williams* v. *United States,* 341 U.S. 97, 101-102; *Screws* v. *United States,* 325 U.S. 91, 101-103.[6]

2. The district court also asserted that Section 310(b), which prohibits convicted violators of the

[6] The same considerations show that in the clause "principal purpose, the word "principal" does not make the Act too vague.

Act from lobbying for a three-year period, contravenes the First Amendment. The short answer to this assertion is that if an individual convicted of a felony may be forever deprived of his civil rights, and if conviction of some offenses may disqualify the offender from thereafter holding any office of honor, trust, or profit under the United States, then *a fortiori* lobbyists convicted of violating the Lobbyong Act may, constitutionally, for a three-year period, be prohibited from lobbying. In any event, Section 310(b)'s validity should not have been passed upon by the court, inasmuch as the question was entirely academic and premature: no one had yet been convicted of violating the Act and the validity of a penalty provision cannot be determined before the penalty is actually imposed. *United States* v. *Wurzbach*, 280 U.S. 396.

Even if the district court was correct in ruling Section 310(b) invalid, the express terms of the Act's separability clause provide that "the validity of the remainder of the Act . . . shall not be affected" by Section 310(b)'s invalidity. In ruling that Section 310(b)'s invalidity renders unconstitutional the other Sections of the Act, the court below completely ignored the clear requirements of the separability clause.

3. The district court decided the foregoing constitutional questions without first deciding whether the Act applied to appellees. This pro-

cedure violated the "traditional policy" of passing on the question of applicability of an Act before reaching any question as to its constitutional validity. *Alma Motor Co.* v. *Timken,* 329 U.S. 129, 142.

The only justification attempted by the court for departing from this settled policy of constitutional adjudication was that the question of applicability of the Act to appellees "is a defense that must be passed upon, in a criminal proceeding, if a prosecution is instituted." (Opinion, Appendix A). But it is apparent that if the question of applicability was left for determination in a criminal proceeding, the question of constitutionality should also have been left for determination in the same proceeding. Moreover, even though the court emphasized that the question of applicability of the Act to N.A.M. must be determined in a later criminal prosecution, it nevertheless, at the same time, granted an injunction permanently enjoining the institution of any such prosecution. Thus, the opinion not only decided the constitutional questions without first deciding the question of applicability but also prevents that latter question from ever being decided.

4. Although Attorney General McGrath resigned before judgment had been entered, the district court insisted, over the defendant's opposition, in subsequently entering *nunc pro tunc* an order of injunction against him, although he no

longer had any official connection with the Lobbying Act or with federal criminal prosecutions. It was plain error to enjoin Mr. McGrath after he had left office (*Ex parte La Prade*, 289 U.S. 444, 455-6; *Snyder* v. *Buck*, 340 U.S. 15), and the direction that the decree be entered *nunc pro tunc* did not serve to cure the error. *Cuebas* v. *Cubeas*, 223 U.S. 376, 390.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General

MAY 1952.

APPENDIX A

1. Opinion

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 381-48

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, and KENNETH R. MILLER, *Plaintiffs,*

v.

J. HOWARD MCGRATH, *Defendant.*

Before Wilbur K. Miller, Circuit Judge; Henry A. Schweinhaut and Alexander Holtzoff, District Judges.

Holtzoff, District Judge: This action is brought by the National Association of Manufacturers of the United States and one of its officers against the Attorney General of the United States, to enjoin him from instituting prosecutions against them for violations of the Federal Regulation of Lobbying Act (Act of August 2, 1946, secs. 302-311, 60 Stat. 839; 2 U.S.C.A. secs. 261-270). The basis of the action is two-fold: first, that the Act is un-

constitutional; and, second, that even if valid, it is not applicable to the plaintiffs.

The Act may be divided into two arts: First, all persons, except political committees, who directly or indirectly solicit, collect, or receive money to be used principally to aid, or whose principal purpose is to aid in the passage or defeat of any legislation by the Congress of the United States; or to influence, directly or indirectly, the passage or defeat of legislation by the Congress of the United States, are required to keep a detailed and exact account of contributions and expenditures with receipted bills, and to file with the Clerk of the House of Representatives quarterly statements listing contributions and expenditures (Secs. 303-307).

The second part of the Act requires persons who engage for pay, or for any consideration, to attempt to influence the passage or defeat of legislation by the Congress of the United States, to register with the Clerk of the House of Representatives and with the Secretary of the Senate, and to file certain quarterly reports (Sec. 308). These two parts of the Act are severable. The second is not involved in this action.

It is a general principle that equity will not enjoin prosecuting officers of the Government from instituting or maintaining criminal prosecutions.[1]

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[1] *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95. *Cave* v. *Rudolph*, 53 App. D. C. 12, 15.

Any defense that a person has to a criminal prosecution may be asserted at the trial of the criminal case and will not be adjudicated in advance by a court of equity. For this reason, this Court will not consider the contention that on the factual situation presented by the evidence, consisting of lengthy depositions and voluminous exhibits, the plaintiff Association is not subject to the terms of the statute. This is a defense that must be passed upon, in a criminal proceeding, if a prosecution is instituted.

On the other hand, an exception to the general principle is at times made if it is contended that the statute is unconstitutional and the consequences of a violation may be unusually serious, possibly resulting in irreparable damage.[2] For example, in this case if the statute is valid and the Association erroneously determines that it is not subject to its provisions, it may be liable to a penalty, not only of a fine, but of a proscription for a period of three years from attempting to influence directly or indirectly the passage or defeat of any proposed legislation by the Congress.

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[2] *Dobbins* v. *Los Angeles*, 195 U.S. 223, 241; *Ex parte Young*, 209 U.S. 123, 163 *et seq.*; *Truax* v. *Raich*, 239 U.S. 33, 37-39; *Adams* v. *Tanner*, 244 U.S. 590; *Terrace* v. *Thompson*, 263 U.S. 197, 214; *Packard* v. *Banton*, 264 U.S. 140, 143; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 500; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 451-2; *Parker* v. *Brown*, 317 U.S. 341, 349-350; *Hynes* v. *Grimes Parking Co.*, 337 U.S. 86, 98-100.

The Court is of the opinion that this case is within the exception insofar as concerns the contention that the pertinent provisions of the statute are unconstitutional. Accordingly the Court will in this action pass upon the validity of these provisions.

The Government has raised the question whether the plaintiffs are in a position to maintain this action on the ground that no prosecution has, as yet, been threatened. A great deal of testimony has been taken on this issue. The Court finds that such a prosecution has, in fact, been threatened, even though the threat has not been made formally.

The vital provisions of the pertinent portions of the statute (Sec. 307) makes its requirements applicable to any person who, by himself or through any agent or employee, or other persons, in any manner whatsoever, directly or indirectly, solicits, collects, or receives money to be used principally to aid, or whose principal purpose is to aid, in the passage or defeat of any legislation by the Congress, or to influence, directly, or indirectly, the passage or defeat of any legislation by the Congress of the United States. It is a well established principle that a criminal statute must define the crime with sufficient precision and formulate an ascertainable standard of guilt, in order that any person may be able to determine whether any action, or failure to act, is prohibited. A criminal statute which does not comply with

this principle is repugnant to the due process clause and is, therefore, invalid. This is a fundamental principle in our constitutional system, since without it, it would be possible to punish a person for some action or failure to act not defined in the criminal law and which that person had no way of knowing was forbidden.

For example, in *International Harvester Co.* v. *Kentucky,* 234 U.S. 216, 221, the Court passed upon the validity of a Kentucky statute, which made certain combinations for the purpose of controlling prices lawful, unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. The Court held that the statute offered no standard of conduct and was, therefore, invalid.

In *United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 89, the Court held unconstitutional an Act of Congress, which made it unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. This result was reached on the ground that no definite standard of conduct was prescribed by the statute.

In *Conally* v. *General Const. Co.,* 269 U.S. 385, 391, the Court considered an Oklahoma statute, which provided that all persons employed by or on behalf of the State shall be paid not less than the current rate of per diem wages in the locality where the work is performed. It was held that

this statute was repugnant to the due process clause of the Fourteenth Amendment on the ground that the phrase "current rate of wages" and the word "locality" were indefinite and ambiguous. The Court summarized the pertinent principles as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary motions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 456, the Court struck down a State statute, which declared all combinations to be against public policy, unlawful and void, except those whose object and purpose was to conduct operations at a reasonable profit or to market at a reasonable profit those products which otherwise could not be so marketed. The Court reached the conclusion that this statute involved so many factors of varying effect that one could not decide in advance

whether any proposed action on his part would violate it.

In *Champlin Rfg. Co.* v. *Commission,* 286 U.S. 210, 242, the Court held invalid a statute, which prohibited production of crude oil in such manner and under such conditions as to constitute waste. The Court referred to the fact that the general expressions employed were not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty.

In *Lanzetta* v. *New Jersey,* 306 U.S. 451, the Court had before it a New Jersey statute to the effect that any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, is declared to be a gangster. The Court held that the words "gang" and "gangster", and the phrase, "known to be a member", were ambiguous and so vague, indefinite, and uncertain as to render the statute repugnant to the due process clause of the Fourteenth Amendment.

In *Winters* v. *New York,* 333 U.S. 507, a New York statute which punished anyone who published, sold, distributed, or showed, or had in his possession, with intent to sell, distribute or show, any printed paper principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of

bloodshed, lust, or crime, was deemed not to meet the required standards and not to contain ascertainable standards of guilt. The Court concluded that the statute was violative of the due process clause of the Fourteenth Amendment.

The Court of Appeals for the District of Columbia in *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, passed upon a statute imposing penalties on any street railway company in the District of Columbia, that failed to supply and operate a sufficient number of cars, to all persons desirous of the use of said cars, "without crowding said cars". The Court held that the statute was unconstitutional, as the phrase "without crowding" was to uncertain and indefinite to constitute an ascertainable standard of guilt. It pointed out that the dividing line between what is lawful and unlawful may not be left to conjecture.

Applying the foregoing doctrine to the instant case, the conclusion is inescapable that Sections 303 to 307 are invalid. The clause "to influence, directly or indirectly, the passage or defeat of any legislation by the Congress" is manifestly too indefinite and vague to constitute an ascertainable standard of guilt. What is meant by influencing the passage or defeat of legislation indirectly? It may be communication with Committees or Members of the Congress; it may be to cause other persons to communicate with Committees or Members of the Congress; it may be to influence

public opinion by literature, speeches, advertisements, or other means in respect to matters that might eventually be affected by legislation; it may be to influence others to help formulate public opinion. It may cover any one of a multitude of undefined activities. No one can foretell how far the meaning of this phrase may be carried. No one can determine in advance what activities are comprehended within its scope.

The statement found in a prior clause of Section 307 to the effect that its provisions apply to certain persons whose principal purpose is to aid in the accomplishment of the enumerated objectives, is likewise subject to the same criticism.

What is meant by "principal purpose"? Is the term "principal" used as distinguished from "incidental"? May a person have a number of principal purposes? Or is the term used as meaning the "chief" purpose of a person's activities? When does a purpose become principal and when does it cease to be such? The Act contains no definition of that term.

We conclude that Sections 303 to 307, inclusive, are invalid as contravening the due process clause of the Fifth Amendment in failing to define the offense with sufficient precision and to set forth an ascertainable standard of guilt.

Section 310 of the Act, which relates to penalties, subjects any person who violates the provisions of the Act to a fine of not more than

$5,000, or imprisonment for not more than twelve months, or both. In addition, subsection (b) of Section 310, provides that any person so convicted shall be prohibited for a period of three years from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation, or from appearing before a Committee of the Congress in support of or opposition to proposed legislation. Violations of this prohibition are made felonies punishable by imprisonment for not more than five years or a fine of $10,000.

Freedom of speech and the right of the people peaceable to assembly and to petition the Government for redress of grievances are guaranteed by the First Amendment to the Constitution. Congress is prohibited from making any law abridging these rights. The penalty provision of the Act, however, manifestly deprives a person convicted of violating the statute, of his constitutional right of freedom of speech and his constitutional right to petition the legislative branch of the Government. This clause is obviously unconstitutional. A person convicted of a crime may not for that reason be stripped of his constitutional privileges. In principle this provision is no different than would be an enactment depriving a person of the right of counsel, or the right of trial by jury, for a period of three years after conviction. It is inconceivable that

anyone would argue in support of the validity of such a provision, and yet, in principle, the penalty clause in this statute is no different. We, therefore, reach the further conclusion that Sections 303 to 307 inclusive, of the statute are unconstitutional in that the penalty attached to their violation is invalid and contravenes the First Amendment to the Constitution.

Accordingly, we hold that Sections 303 to 307, inclusive, of the Act are unconstitutional. We regard Section 308 as severable and we, therefore, do not express any opinion as to its validity, because that question is not involved in this litigation.

A permanent injunction against the prosecution of the plaintiffs for violations of any provision of Sections 303 to 307, inclusive, is granted.

/s/ WILBUR K. MILLER
United States Circuit Judge.

/s/ HENRY A. SCHWEINHAUT
United States District Judge.

/s/ ALEXANDER HOLTZOFF
United States District Judge.

MARCH 17, 1952

2. Final Judgment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 381-48

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, and KENNETH R. MILLER, *Plaintiffs,*

v.

J. HOWARD MCGRATH, *Defendant.*

This action having come before the Court for final hearing on plaintiffs' request for a permanent injunction restraining defendant from instituting prosecutions against them for violation of the Federal Regulation of Lobbying Act (60 Stat. 839, 2 U.S.C. 261-270) and for declaratory relief; and the Court having considered the evidence, pleadings, briefs and the entire record in the case; and the Court having concluded that the defendant has threatened plaintiffs with criminal prosecutions if they fail to comply with the Act, that a present and justiciable controversy between plaintiffs and defendant exists, that plaintiffs are entitled to invoke the equity jurisdiction

of this Court to enjoin the threatened criminal prosecutions, and that Sections 303 through 307 and the penalty provision of Subsection (b) of Section 310 of the statute are unconstitutional; and the Court having rendered a written opinion and having made Findings of Fact and Conclusions of Law; it is by the Court

ORDERED, ADJUDGED AND DECREED that defendant is permanently enjoined from instituting any prosecution against plaintiffs, or either of them, for any violation, past or future, of any provision of Sections 303 to 307, inclusive, of the Federal Regulation of Lobbying Act (60 Stat. 839, 2 U.S.C. 261-270).

Dated May 2, 1952, to take effect as of March 17, 1952.

/s/ WILBUR K. MILLER
United States Circuit Judge.

/s/ HENRY A. SCHWEINHAUT
United States District Judge.

/s/ ALEXANDER HOLTZOFF
United States District Judge.

APPENDIX B

LEGISLATIVE REORGANIZATION ACT OF 1946

1. Title III—Regulation of Lobbying Act (60 Stat. 812, 839; 2 U.S.C. 261-270)

SHORT TITLE

SEC. 301. This title may be cited as the "Federal Regulation of Lobbying Act".

DEFINITIONS

SEC. 302. When used in this title—

(a) The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

(b) The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure.

(c) The term "person" includes an individual, partnership, committee, association, corporation, and any other organization or group of persons.

(d) The term "Clerk" means the Clerk of the House of Representatives of the United States.

(e) The term "legislation" means bills, resolutions, amendments, nominations, and other

matters pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House.

DETAILED ACCOUNTS OF CONTRIBUTIONS

SEC. 303. (a) It shall be the duty of every person who shall in any manner solicit or receive a contribution to any organization or fund for the purposes hereinafter designated to keep a detailed and exact account of—

(1) all contributions of any amount or of any value whatsoever;

(2) the name and address of every person making any such contribution of $500 or more and the date thereof;

(3) all expenditures made by or on behalf of such organization or fund; and

(4) the name and address of every person to whom any such expenditure is made and the date thereof.

(b) It shall be the duty of such persons to obtain and keep a receipted bill, stating the particulars, for every expenditure of such funds exceeding $10 in amount, and to preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items.

RECEIPTS FOR CONTRIBUTIONS

SEC. 304. Every individual who receives a contribution of $500 or more for any of the purposes hereinafter designated shall within five days after receipt thereof rendered to the person or organization for which such contribution was received a detailed account thereof, including the name and address of the person making such contribution and the date on which received.

STATEMENTS TO BE FILED WITH CLERK OF HOUSE

SEC. 305. (a) Every person receiving any contributions or expending any money for the purposes designated in subparagraph (a) or (b) of section 307 shall file with the Clerk between the first and tenth day of each calendar quarter, a statement containing complete as of the day next preceding the date of filing—

(1) the name and address of each person who has made a contribution of $500 or more not mentioned in the preceding report; except that the first report filed pursuant to this title shall contain the name and address of each person who has made any contribution of $500 or more to such person since the effective date of this title;

(2) the total sum of the contributions made to or for such person during the calendar year and not stated under paragraph (1);

(3) the total sum of all contributions made to or for such person during the calendar year;

(4) the name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar year, of $10 or more has been made by or on behalf of such person, and the amount, date, and purpose of such expenditure;

(5) the total sum of all expenditures made by or on behalf of such person during the calendar year and not stated under paragraph (4);

(6) the total sum of expenditures made by or on behalf of such person during the calendar year.

(b) The statements required to be filed by subsection (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

STATEMENT PRESERVED FOR TWO YEARS

SEC. 306. A statement required by this title to be filed with the Clerk—

(a) shall be deemed properly filed when deposited in an established post office within the prescribed time, duly stamped, registered, and directed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia, but in the event it is not received, a

duplicate of such statement shall be promptly filed upon notice by the Clerk of its nonreceipt;

(b) shall be preserved by the Clerk for a period of two years from the date of filing, shall constitute part of the public records of his office, and shall be open to public inspection.

PERSONS TO WHOM APPLICABLE

Sec. 307. The provisions of this title shall apply to any person (except a political committee as defined in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party), who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly, solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid, in the accomplishment of any of the following purposes:

(a) The passage or defeat of any legislation by the Congress of the United States.

(b) To influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.

REGISTRATION WITH SECRETARY OF THE SENATE AND CLERK OF THE HOUSE

Sec. 308. (a) Any person who shall engage himself for pay or for any consideration for the

purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included. Each such person so registering shall, between the first and tenth day of each calendar quarter, so long as his activity continues, file with the Clerk and Secretary a detailed report under oath of all money received and expended by him during the preceding calendar quarter in carrying on his work; to whom paid; for what purposes; and the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any articles or editorials; and the proposed legislation he is employed to support or oppose. The provisions of this section shall not apply to any person who merely appears before a committee of the Congress of the United States in support of or opposition to legislation, nor to any public official acting in his official capacity; nor in the case of any news-

paper or other regularly published periodical (including any individual who owns, publishes, or is employed by any such newspaper or periodical which in the ordinary course of business publishes news items, editorials, or other comments, or paid advertisements, which directly or indirectly urge the passage or defeat of legislation, if such newspaper, periodical, or individual engages in no further or other activities in connection with the passage or defeat of such legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

(b) All information required to be filed under the provisions of this section with the Clerk of the House of Representatives and the Secretary of the Senate shall be compiled by said Clerk and Secretary, acting jointly, as soon as practicable after the close of the calendar quarter with respect to which such information is filed and shall be printed in the Congressional Record.

Reports and Statements To Be Made Under Oath

Sec. 309. All reports and statements required under this title shall be made under oath, before an officer authorized by law to administer oaths.

PENALTIES

Sec. 310. (a) Any person who violates any of the provisions of this title, shall, upon conviction, be guilty of a misdemeanor, and shall be punished by a fine of not more than $5,000 or imprisonment for not more than twelve months, or by both such fine and imprisonment.

(b) In addition to the penalties provided for in subsection (a), any person convicted of the misdemeanor specified therein is prohibited, for a period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation or from appearing before a committee of the Congress in support of or opposition to proposed legislation; and any person who violates any provision of this subsection shall, upon conviction thereof, be guilty of a felony, and shall be punished by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

EXEMPTION

Sec. 311. The provisions of this title shall not apply to practices or activities regulated by the Federal Corrupt Practices Act nor be construed as repealing any portion of said Federal Corrupt Practices Act.

2. Separability Clause (60 Stat. 812, 814)

Sec. 1 (b) *Separability Clause.* If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 174

J. HOWARD McGRATH,

Appellant,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA and KENNETH R. MILLER,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 381-48

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Plaintiffs,*

v.

J. HOWARD McGRATH,

Defendant.

APPELLEES' COUNTER-STATEMENT WITH RESPECT TO JURISDICTION, AND MOTION TO DISMISS

The Solicitor General has sought to take this appeal on behalf of alternative appellants and without specifying a particular appellant. The appeal papers state that the appeal is taken by Mr. McGrath, or in the alternative by Mr. McGranery, or in the further alternative by the United States. The purpose of this counter-statement is to make clear appellees' position concerning this procedure, and to request the Court to rule specifically and expeditiously as to who is the proper appellant.

For reasons more fully developed below, appellees believe that neither Mr. McGrath nor the United States is entitled to appeal and therefore the appeal should be dismissed as to them. We believe that Mr. McGranery had the right to substitute himself for Mr. McGrath in the district court and thereafter to take the appeal in his own

name. This was not done, and the question arises whether the proper procedure has been followed in seeking to take an appeal before being made a party below. However, since he has moved to substitute himself in the Supreme Court, we do not press the point here. We do insist, however, that this Court should by order make it clear that Mr. McGranery is substituted unconditionally and is the sole appellant, and that this should be done as expeditiously as possible so that appellees will know who the real appellant is and accordingly know their rights and obligations in this matter.

Mr. McGrath Is Not Entitled to Appeal and the Appeal Should Be Dismissed as to Him

Mr. McGrath resigned on April 7, 1952. The petition for appeal was presented, and the order allowing appeal entered, on May 28, 1952. Since this is a suit for declaratory judgment and injunctive relief against enforcement of the Federal Regulation of Lobbying Act, and since after his resignation Mr. McGrath had no authority to enforce the Act, he was not at the time the appeal was taken in a position to invoke a review by this Court. All right and discretion to do so passed to his successor, Mr. McGranery. The Supreme Court has expressly so held in cases where the facts for all material purposes were identical to those here. *Davis* v. *Preston*, 280 U. S. 406; *Snyder* v. *Buck*, 340 U. S. 15, 20. Accordingly, we submit that the appeal should be dismissed as to Mr. McGrath.

The United States Is Not Entitled to Appeal and the Appeal Should Be Dismissed as to It

The Solicitor General requests that, if neither Mr. McGrath nor Mr. McGranery is deemed a proper appellant, the appeal be considered as taken by the United States.

The Solicitor General relies on 28 U.S.C. 2403, which provides in part that: "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality."

That statute, however, has no application here. By its language it applies only to actions where "the United States or any agency, officer or employee thereof is not a party." Here the Attorney General of the United States was a party.[1] Aside from this language, it is clear from the statute as a whole that it was not intended to apply to situations such as this. For example, it provides that in the circumstances described the Court shall certify to the Attorney General the fact that the constitutionality of an Act of Congress is involved. The obvious purpose is to put the United States on notice where a suit between private parties involves a constitutional question, so that the United States may intervene and defend the statute. There is no need for such notice to the Attorney General in a case such as this where the Attorney General is himself a party

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[1] If it be suggested that no officer was a party because the Attorney General was not sued in his official capacity, the answer is that the statute does not distinguish between actions against officers in their official capacity and actions against them individually. The suit here was grounded on acts performed by the Attorney General by virtue of his office; that is enough to take the matter out of the statute. This conclusion is confirmed by the fact that the statutory predecessor of this section made the intervention procedure applicable to any suit "to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party" (50 Stat. 751, 28 U.S.C. 401 (1940 ed.)). In the revision of Title 28 of the United States Code the words "as such officer or employee" were dropped.

and already has notice. Moreover, the statute was intended to authorize intervention in the court where the action is initiated, not to authorize appeal by the United States where it has made no effort to intervene below. We submit, therefore, that the statute does not apply here and consequently the appeal should be dismissed as to the United States.

Mr. McGranery Had the Right to Substitute Himself for Mr. McGrath in the District Court and to Take the Appeal in His Own Name.

Mr. McGranery was appointed to the office of Attorney General on April 3, 1952, his appointment was confirmed on May 20, 1952, and he took the oath of office on May 27, 1952. Under Rule 25(d) of the Federal Rules of Civil Procedure, he had the right to substitute himself for Mr. McGrath in the court below, and thereafter to take this appeal in his own name. It is the general rule that before one may invoke the appellate jurisdiction of the Supreme Court he must establish his status as a party to the record in the court below. *Bayard* v. *Lombard*, 9 Howard 530, 531; *Payne* v. *Niles*, 20 Howard 219, 221; *Ex parte Cutting*, 94 U.S. 14, 20-22; *Industrial Commissioner of New York* v. *Irving Trust Co.*, 286 U.S. 543. This would seem to indicate that Mr. McGranery should have moved to substitute himself in the district court before taking the appeal. Appellees do not insist upon this procedural point, however, because: (1) they recognize the interest of the United States in obtaining Supreme Court review and have no desire to block review by making any such technical objection; and (2) Mr. McGranery has moved to substitute himself in the Supreme Court, which motion appellees do not oppose.

Appellees do insist, however, that if the appeal is to be deemed as taken by Mr. McGranery and if he is substituted for Mr. McGrath by the Supreme Court, such substi-

tution should not be conditional as the Solicitor General appears to suggest. The Solicitor General says that he requests Mr. McGranery's substitution "solely in order to preserve the Government's right of appeal" and that "the request in no way concedes or implies that Mr. McGranery has threatened or is threatening to institute criminal prosecutions against either or both appellees for violations of the Act, or that the allegations or findings in the district court relating to Mr. McGrath or Mr. Clark are applicable to Mr. McGranery" (Statement as to Jurisdiction, p. 1, fn. 1). This statement at least suggests that, in the Solicitor General's view, appellees might be required to show that Mr. McGranery has so threatened. If that is the intended implication, it is incorrect. Under Rule 25(d), Mr. McGranery may be substituted either on his own motion or on that of appellees. Here he has made the motion. His grounds are that substitution is necessary to permit him to appeal and seek reversal of a judgment which would otherwise stand in the way of his enforcement of the statute. Under such circumstances it is not necessary that appellees also show that he is threatening to enforce the statute. Certainly appellees are not required to make any showing in support of Mr. McGranery's motion, and if his motion is granted there is no requirement that appellees also move for his substitution. Consequently, if this Court grants Mr. McGranery's motion for substitution it should not be conditioned in any way.

This Court Should Enter an Order as Expeditiously as Possible Specifying the Appellant

Appellees are entitled to know as soon as possible who the actual appellant is. Otherwise they may be subjected to uncertainty and vexation for which they are not responsible and which they cannot remedy.

Under *Snyder* v. *Buck*, 340 U.S. 15, so long as the case is still "pending" appellees run the risk that, if a motion to substitute Mr. McGranery is not made within 6 months from the time he took office (or by November 27, 1952), the action may be dismissed and they may be forced to start over below.[2] If the Supreme Court substitutes Mr. McGranery on the Solicitor General's motion prior to November 27, 1952, appellees need no longer be concerned with this problem. If the Supreme Court should conclude, however, that Mr. McGrath is the proper appellant, then appellees might be required to move to substitute Mr. McGranery before that date. If the Court should wait until after November 27, 1952, and then rule that no one has properly appealed and the appeal should be dismissed in its entirety, it might be necessary that appellees have on file in the Supreme Court or in the district court, or in both, a timely motion to substitute Mr. McGranery. Consequently, unless the Supreme Court rules on this question in advance of November 27, 1952, appellees will be in a dilemma as to whether any action is required of them, and, if so, where.

Appellees are in no way responsible for this situation. It arises because Mr. McGranery did not move to substitute himself in the district court before seeking to appeal, and has moved in the Supreme Court to substitute and appeal only if Mr. McGrath is an improper appellant. Appellees are entitled to know who the appellant is and con-

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[2] Paragraph 4 of Rule 19 of the Revised Rules of the Supreme Court provides that the matter of substitution in cases of this kind is covered by section 11 of the Act of February 13, 1925 (43 Stat. 936, 941). That statute authorized substitution within 6 months after the predecessor's separation from office, which in this case would be October 7, 1952. That Act, however, was specifically repealed as of September 1, 1948 (62 Stat. 992, 1000). We take it, therefore, that the Solicitor General's motion is based on the assumption that Rule 25(d) of the Federal Rules of Civil Procedure now applies to substitution in the Supreme Court as well as in the district courts. See *Fleming* v. *Mohawk*, 331 U.S. 111; *Snyder* v. *Buck*, 340 U.S. 15, 17, fn. 2.

sequently what is required of them to protect their judgment below. For these reasons we respectfully submit that the Supreme Court should enter an order specifying the appellant and, if it is Mr. McGranery as we think it should be, substituting him unconditionally on the motion of the Solicitor General. We further submit that such an order should be entered as soon as possible, and in any event well in advance of November 27, 1952.

Appellees Do Not Oppose the Jurisdiction of the Supreme Court on the Ground that the Questions Involved Are Not Substantial.

Appellees do not, of course, agree that the district court erred in any of the respects assigned by the Solicitor General. Nor do we agree with the arguments made by him in his Statement as to Jurisdiction. We believe that the statute involved is clearly unconstitutional, as held by the district court, and that the judgment below should be affirmed. However, since this is the first case involving the constitutionality of the Federal Regulation of Lobbying Act to reach the Supreme Court, we are not contending here that the questions involved are so unsubstantial as to preclude review by the Supreme Court.

Respectfully submitted,

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Attorneys for Appellees.

JUNE 13, 1952.